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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1930

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 65–74) is reported in 68 C. Cls. 414.

JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1929. (R. 74.) Petition for certiorari was filed January 23, 1930 (R. 74), and the writ was granted April 14, 1930 (R. 75), 281 U. S. 710. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Did the alleged requisition by the President of the total amount of electricity which the Niagara Falls Power Company was capable of producing by the utilization of all water capable of being diverted

through its canal, a part of which water was owned by the petitioner, and the accompanying waiver agreement under which the Power Company agreed to distribute such power solely to certain designated private consumers, constitute such a taking of petitioner's property by the United States for public use as to entitle the petitioner to receive compensation under the Fifth Amendment?

STATUTES INVOLVED

A summary of certain emergency legislation relating to appropriation of private property for use by the United States will be found in the Appendix, *infra*, pp. 22–27.

STATEMENT

Petitioner owned and operated a plant for the manufacture of paper near and above the Falls of the Niagara River. The power for the plant was derived exclusively from water of the Niagara River. (R. 47–48.) This was drawn from the canal of the Niagara Falls Power Company pursuant to certain deeds, leases, and agreements between the two companies and their predecessors. (R. 53, 54, 56–58.) The right of the Niagara Falls Power Company to divert water from the Niagara River was derived from private conveyances of land abutting on the river, letters patent from the State of New York, and special acts of the New York Legislature. (R. 48–50.) The Power Company also enjoyed a revocable license issued by the Secretary of War, author-

izing it to divert a specified amount of water from the river. (R. 50.)

In 1917 the Council of National Defense determined that the manufacture of newsprint paper was not an essential war industry. (R. 58.) On December 28, 1917, the Secretary of War, in the name of the President, issued an order purporting to requisition on behalf of the United States the total quantity and output of the electrical power which was capable of being produced and/or delivered by the Niagara Falls Power Company through the use of all waters diverted or capable of being diverted through its intake canal. It was stipulated in the requisition that just compensation would be paid for power delivered thereunder. (R. 58.)

The Secretary of War advised the Power Company that this requisition contemplated the use of all waters originally diverted from the Niagara River by the Power Company and particularly included that formerly allocated to the petitioner. (R. 61.) Simultaneously with the issuance of the requisition order there was executed an agreement between the Secretary of War and the Power Company, which, in substance, provided that in consideration of the waiver by the United States of its right to receive the output of the power plant, the Power Company would waive all rights to compensation from the Government and would distribute its power solely to certain consumers listed in a schedule attached to the agreement. (R. 58–61.)

The petitioner was not among those listed as being entitled to power or to other service from the Power Company. (R. 61.) On February 7, 1918, the petitioner ceased using water from the canal of the Power Company and did not resume the use of such water until November 30, 1918, when the prior requisition order was revoked. (R. 62.) During this entire period the Power Company appropriated and used all the water diverted from the Niagara River through its canal and did not deliver any water to the petitioner. (R. 62–63.)

The Paper Company has never been compensated by the United States or anyone else for the losses suffered by it as a result of being deprived of its water power. (R. 63.)

SUMMARY OF ARGUMENT

It does not appear that the action of the Secretary of War acting in behalf of the President was expressly or by necessary implication authorized by Congress. Congress had, at most, sanctioned the requisitioning of products of plants. This is not to be construed as authorizing the appropriation of real property belonging to a third person for the purpose of increasing the productive capacity of a generating plant. No legislative enactment has been found which is applicable to the instant case. In the absence of such authorization the acts of public officers do not bind the Government.

There was no taking by the United States. The requisition order when issued was modified by agreement that the Government should not receive

electrical power. Moreover, the requisition itself was directed to the product or output of the power plant; the *res* which the Secretary of War purported to commandeer was electricity, not water or hydraulic power. *Duckett & Co.* v. *United States*, 266 U. S. 149, is not controlling.

The purpose and effect of the action of the Secretary of War was to regulate the distribution of electrical and hydraulic power rather than to appropriate such power to the United States. The nature of the interference with petitioner's property was essentially similar to the regulation of the coal and coke industries under the Lever Act. If the petitioner considered such regulation to be unreasonable or unauthorized, it could have refused to obey until provision had been made for the granting of adequate compensation.

If the action of the Secretary of War, considered as regulatory, was unauthorized, the injury complained of was a tort for which the petitioner can not recover from the United States. The Power Company was then a joint tort-feasor and is liable as such. Since the Power Company received the direct pecuniary benefit of the taking, there is no injustice in leaving the petitioner to seek its remedy in an action against that company.

If entitled to any recovery, petitioner may not recover interest in the Court of Claims. The suit is not predicated upon any statute allowing just compensation. It was not instituted by the Government for the condemnation of property. It was

brought in the Court of Claims, and the right to bring it there was dependent upon the existence of an implied contract, entered into by the United States. If any contract could be implied, which we dispute, it would be to pay the value of the property as of the date of its taking, and interest could not be added, because of Section 177 of the Judicial Code.

ARGUMENT

I

IT DOES NOT APPEAR THAT THE ALLEGED TAKING OF PETITIONER'S WATER RIGHTS WAS, EXPRESSLY OR BY NECESSARY IMPLICATION, AUTHORIZED BY LEGISLATIVE ENACTMENT, AND IN THE ABSENCE OF SUCH AUTHORIZATION, PETITIONER IS WITHOUT RECOURSE AGAINST THE UNITED STATES

To entitle a claimant to recover compensation from the United States for expropriation of his property by the Government, it must appear that the act of taking was authorized by Congress. This is true, because the right to recover must be founded either on a statute authorizing the payment of compensation or on a contract express or implied to pay for what is taken. In the absence of authority to appropriate the property there can be no contract express or implied and the taking is tortious if the owner has not assented. The injured party is therefore without recourse against the Government in the courts.

Although petitioner has proceeded on the assumption that authority was vested in the Secretary of War to take the water alleged to have been taken and thus to bind the United States to pay for it, we respectfully submit that the existence of such authority is not apparent. The proceedings appear to have been instituted under Section 145 of the Judicial Code (U. S. C., Title 28, Section 250), which confers upon the Court of Claims jurisdiction to hear and determine all claims "founded upon the Constitution of the United States or any law of Congress, * * * upon any contract, express or implied, with the Government of the United States * * * ." A claim for compensation by reason of expropriation of property presupposes a taking by the United States. There is no taking by the United States unless the taking is expressly or impliedly authorized by Congress.

The principle governing this phase of the right to compensation under the Fifth Amendment was discussed by this Court in the case of *Hooe* v. *United States*, 218 U. S. 322, where it was argued that the claim could be rested exclusively on the Constitution, without reference to any statute. This Court said (pp. 335, 336):

> The argument is ingenious but it is unsound. * * * If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in

> any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, can not create a claim against the Government "founded upon the Constitution." * * * The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.

To the same effect are *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 330; *Baltimore and Ohio Railroad* v. *United States*, 261 U. S. 592; *Mitchell* v. *United States*, 267 U. S. 341; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200. Cf. *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 54–57; *Whiteside* v. *United States*, 93 U. S. 247, 257.

Petitioner does not cite any legislative enactment showing that the act of the Secretary of War was the act of the Government. The findings of the Court of Claims do not determine the question. Finding XIV (R. 63) states that the petitioner has received no compensation on account of the water and water rights "of which it was deprived as aforesaid between February 7, 1918, and November 30, 1918,

by the United States." If this be more than a mere conclusion of law it must be read in the light of the preceding findings and, when so read, does not, we submit, find the fact that the Secretary of War was acting within the scope of his authority. Such authority depends on legislative enactment conferring authority either on the President or on the Secretary of War. If the former, there must also be an Executive Order delegating authority to the Secretary. Of these matters this Court takes judicial notice.

In the Appendix (*infra*, pp. 22–27) we have summarized certain war-time legislation which might conceivably be interpreted as applicable to the instant case. We believe that this list is comprehensive both as to statutes in effect when the requisition order was issued and as to statutes thereafter enacted which might conceivably be interpreted as ratifying the action of the Secretary of War. We believe that the statutes thus summarized fail to authorize or ratify the acts of the Secretary of War in question.

Several statutes, such as the National Defense Act (*infra*, pp. 22–23), gave the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these statutes that the Secretary of War assumed, in behalf of the President, to requisition the output of the power plant in the instant case. But the grant of authority merely to requisition the product of a power plant does not authorize the taking of water power from a third party in order to increase the productive

capacity of the plant. We have been unable to find any statute or Executive Order authorizing the Secretary of War to take water rights for the generation of electricity by a private corporation for the purpose of supplying current to private consumers.

It is urged that the requisition of the capacity output of the power plant necessarily involved a requisition of petitioner's water, and that such was the intent of the Government. But it does not appear that the President or the Secretary of War was entitled to requisition anything other than electric power which the Power Company could produce by means of facilities and materials over which it had control.

The instant case is clearly distinguishable in this respect from *Duckett & Co.* v. *United States*, 266 U. S. 149, and the cases cited on page 16 of petitioner's brief. In the *Duckett case* Congress had authorized the seizure of transportation systems, and the appropriation of the physical property necessarily involved a taking of the lessee's interest in such property. Similarly, in the cases cited on page 16 of petitioner's brief, the injuries complained of were the direct and necessary consequences of authorized acts.

Electrical energy was not the product of the Paper Company's mill, nor even *a* product thereof. The Court of Claims found (R. 54) that the machinery with which the mill was equipped "could be driven only by water power applied directly." Nor was water power a product of the plant; it was, as petitioner states, appurtenant to the realty on which the mill was situated. Consequently, it does not appear

that the taking of petitioner's water, if it *was* taken in the constitutional sense, was pursuant to any authority expressly or impliedly granted by Congress. In the absence of such authority, petitioner can not recover. Its cause of action sounds in tort, for which the Government can not be sued.

II

THE ACTION OF THE SECRETARY OF WAR DID NOT AMOUNT TO A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT

Petitioner bases its alleged right to recovery in this action on an appropriation of its water rights by the United States, giving rise to an implied promise to pay compensation. The original requisition order of December 28, 1917, was addressed to the Niagara Falls Power Company, and in terms appropriated the product or output of the power plant. No reference was made therein to the Paper Company. The Power Company was instructed to deliver to the United States the total quantity of electrical power which it was capable of producing. Thus the *res* which was taken by the United States was "the total quantity and output of the electrical power," and not, as petitioner states (Brief, p. 17) "the use of all waters diverted or capable of being diverted" through the canal. The Government did not want water power, and did not take it. It did intend, as petitioner states (Brief, p. 17) that use should be made by the Power Company of water theretofore used by the Paper Company. But it does not follow from this

that the Government intended to expropriate the water. The petitioner was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights either to the United States or to the Power Company. Thus there was no physical taking by the United States of any property belonging to the Paper Company, and the case is distinguishable from *Duckett & Company* v. *United States*, *supra*, because there the Government acquired physical possession and enjoyment, for its own purposes, of the claimant's leasehold and the appropriation was authorized by statute.

Coincidently with the requisition in the instant case, an agreement was made between the United States and the Power Company under the terms of which delivery of electricity to the Government was expressly waived, and the Power Company was required to make delivery thereof to customers approved by the Government. The execution of the waiver precludes the idea of there having been any appropriation by the United States even of the power produced by the Power Company. Ultimately the Government took nothing, and assumed only to regulate the selection of the Power Company's sale of its product to essential industries. If, as petitioner argues (Brief, p. 17), electrical power is the *alter ego* of water power, then since the Government did not take electricity it did not take water.

There can be no recovery under the Fifth Amendment unless property is actually taken and used by the sovereign for a public purpose. *Legal Tender*

Cases, 12 Wall. 457; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Wisconsin, &c., R'd Co.* v. *Jacobson*, 179 U. S. 287; *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146.

The jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property must rest on the receipt of a consideration moving to the United States. *Bothwell* v. *United States*, 254 U. S. 231. Counsel for the Government are not aware of any case in which the sovereign has been required to pay compensation where there has been no direct transfer of property to and for the use of the sovereign; nor do petitioner's citations disclose the existence of such liability.

As this Court said in *Interocean Oil Co.* v. *United States*, 270 U. S. 65, at page 69:

> There was no enrichment of the Government to its knowledge, no benefit in the form of property given to it or of service rendered to it from which the contract by it to pay could be implied.

Consequently, we submit, petitioner can not recover from the United States for such loss as it may have sustained.

The instant case, although not necessarily controlled by *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, is more closely comparable to it than to the *Duckett case*. In the *Omnia case*, the Government requisitioned the capacity output of a steel plant, thereby making it impossible for the steel company

to execute its contract to furnish steel to the claimant. This Court held that since the Government had not taken claimant's contract, claimant was without recourse against the United States. The decision, we believe, was based not only on the nature of the claimant's rights, but also on the nature of the interference with those rights. The requisition *necessarily* occasioned a loss to the claimant, just as in the instant case; but the interference was only indirect and did not amount to a taking.

III

THE INTERFERENCE WITH PETITIONER'S PROPERTY WAS, AT MOST, A RESULT OF THE EXERCISE OF THE POWER OF THE UNITED STATES TO REGULATE INDUSTRY AND THE USE OF NATURAL RESOURCES IN TIME OF WAR, FOR WHICH NO COMPENSATION IS PAYABLE

In the latter part of 1917, the Secretary of War was advised that there was a disposition on the part of the Canadian Power Administrators to forbid the exportation to the United States of power developed on the Canadian side of the Niagara River for the reason, among others, that a portion of the power generated at Niagara Falls was being used for industries which were not essential for the prosecution of the War. (R. 55.) It, therefore, became necessary to control the distribution of power generated on the American side of the river to the end that such power might be devoted solely to essential war industries.

Under Section 25 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276), Congress had authorized the President to regulate the distribution of coal and coke, but the authority did not in terms extend to distribution of electrical or hydraulic power. The National Defense Act (Act of June 3, 1916, c. 134, 39 Stat. 166; *infra*, pp. 22–23), authorized the President in time of war, to commandeer the output of any factory or plant or to take over such plant and operate it through the Ordnance Department of the United States Army. A formal requisition order was accordingly addressed to the Niagara Falls Power Company, and this was immediately followed by the waiver agreement under which the Power Company was allowed to distribute its product to certain essential industries. It seems reasonably clear that the order and the agreement taken together were intended to regulate the Power Company's activities rather than to appropriate its property for use by the United States. We submit that this was not a taking by the Government. The Court of Claims did not find that petitioner demanded compensation and it might be inferred that petitioner tacitly consented to the diversion of its water in the expectation of receiving payment from the Power Company just as the Power Company consented to a regulation by the Government in the expectation of receiving compensation from its customers.

The situation is somewhat analogous to that arising under the Lever Act in connection with the regulation of sales of coal and coke. The regulations

promulgated under that Act were directed both to price and to distribution. In many cases the price which the producer was permitted to charge was substantially lower than what he would have been able to exact in the absence of regulation, but this Court has held that the regulations did not constitute a taking of property by the Government and that no promise to pay the difference in price could be implied. *Morrisdale Coal Company* v. *United States*, 259 U. S. 188.

In *Pine Hill Coal Company, Inc.* v. *United States*, 259 U. S. 191, the claimant alleged that the prices fixed by the Government on sales to third persons were unreasonable and that the receipts were actually less than the cost of production. It attempted to set up a contract of indemnity on the part of the United States based on Section 25 of the Lever Act which provided that in the event the prices fixed for property taken by the United States were not satisfactory, the person entitled to the same should be paid 75% of such price and should be permitted to bring action against the United States for the balance necessary to furnish just compensation. This Court affirmed the judgment of the Court of Claims sustaining a demurrer and held that the statute did not apply to sales by producers to third persons.

In *Atwater & Co.* v. *United States*, 275 U. S. 188, where the claimants, in obedience to the orders of the Fuel Administrator, had consigned coal to a coal exchange, the Government was held not liable for damages arising out of the failure of the exchange to

credit promptly to the claimant the amount of coal so shipped. The basis for the Court's decision was that there was no taking and no implied contract to pay compensation. The Court said (p. 191):

> No part of claimant's coal was consumed or appropriated by the Government.

The argument of petitioner herein that the United States took electrical power (including all water used in the generation of such power) and subsequently distributed it to essential industries would be equally applicable to the fuel cases. Yet, so far as counsel are aware, the point was never made that in regulating the distribution of fuel the Government was expropriating such fuel and selling it, even for the account of the producers, to the public. Had that contention been sustained, it would seem that the various claimants would have been entitled to receive compensation from the Government if they had been able to show that what they received from their customers was not a fair return. Nevertheless, this Court specifically held that there was no taking and no implied promise to pay.

In the instant case, the regulation was directed to distribution rather than to price. Had the petitioner been engaged in the business of supplying power to other consumers, there can be no doubt that the Government could have required it to distribute power exclusively to essential industries. We submit that the fact that petitioner was itself using the power for a non-essential industry (as determined by the Council of National Defense under the Act of August

29, 1916, c. 418, 39 Stat. 619, 649) does not in any way affect the Government's rights in this respect. Nor does the fact that the Government made no provision for the payment of compensation to the petitioner affect the nature of its action as a regulatory measure. It was doubtless assumed that the petitioner would make such charge as it deemed necessary and collect the same from the companies to which its power was furnished.

This Court has repeatedly held that the sovereign may, in the exercise of governmental powers, promulgate regulations and impose restrictions amounting in substance to a deprivation or even complete destruction of property rights. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Morris* v. *Duby*, 224 U. S. 135; *Tagg Bros.* v. *United States*, 280 U. S. 420.

If petitioner considered the President's requirement to be unjust or unreasonable, it should have refused to comply with it until assured of adequate protection. Then the President might have made affirmative provision for reimbursement by the Power Company; or he might have deemed it advisable to take steps toward the appropriation of petitioner's water rights and payment of compensation under the provisions of the National Defense Act, assuming he had authority to do so. As this Court said in the *Morrisdale Coal Company case*, 259 U. S. 188, *supra*, at p. 190:

> It now seeks to hold the Government answerable for making a rule that it saw

> fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker.

It may perhaps be said that the administrative officers had no authority to regulate the distribution of electric and hydraulic power. If it be true that the direction to the Power Company to take and use petitioner's water was unauthorized by law, the injury complained of was simply a tortious interference with petitioner's property, and the United States may not be sued for the torts of its officers or agents. *Schillinger* v. *United States*, 155 U. S. 163; *Bigby* v. *United States*, 188 U. S. 400; *Hijo* v. *United States*, 194 U. S. 315; cf. *Atwater & Co.* v. *United States*, *supra*.

If the interference was tortious, the Power Company was a joint tort-feasor. The Power Company performed the physical act of taking and was the sole recipient of pecuniary profit resulting therefrom. It was directly enabled to increase its production capacity, its sales, and therefore its profits. The record does not disclose any regulation by the Government of its scheduled rates, and it is to be

inferred that its receipts were augmented in proportion to the additional water power which it acquired. There is, therefore, no injustice in the Government's contention that petitioner should have recourse against the Power Company.

IV

IF THE PETITIONER IS ENTITLED TO RECOVER FOR THE TAKING, IT IS NOT ENTITLED TO INTEREST

Petitioner claims interest from the date of the alleged taking at the rate of 6% on the amount of its direct overhead expense as found by the Court of Claims. (R. 64.) It has been held that where an action is, in its essence, a part of condemnation proceedings instituted by the Government, the amount of compensation should include a sum sufficient to give the claimant "the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking," and that such sum may be measured by interest at the proper rate. *Phelps* v. *United States*, 274 U. S. 341; *Liggett & Myers* v. *United States*, 274 U. S. 215; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123. But in each of these cases the property was taken pursuant to express statutory authority, without the consent of its owner, and in each case recovery was had under a statute which expressly provided for the payment of "just compensation."

But if recovery be had in the instant case it can only be under Section 145 of the Judicial Code which gives

the Court of Claims jurisdiction of a suit against the United States to recover on a contract express or implied. When the claim is on contract, no interest can be recovered because of the provisions of Section 177 of the Judicial Code. This section provides that no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims unless upon a contract expressly stipulating for its payment. The Government does not become a debtor until damages have been awarded and no interest is allowable. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
ERWIN N. GRISWOLD,
H. BRIAN HOLLAND,
Attorneys.

DECEMBER, 1930.

APPENDIX

SUMMARY OF EMERGENCY LEGISLATION

National Defense Act (Act of June 3, 1916, c. 134, 39 Stat. 166, 213; U. S. C., Title 50, Sec. 80)

Section 120 authorized the President, in time of war—

> to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such *product or material* as may be required, and which is of the nature and kind usually *produced or capable of being produced* by such individual, firm, company, association, corporation, or organized manufacturing industry. (Italics ours.)

Compliance with such an order was made obligatory, and in the event of noncompliance the President might take over the plant and operate it through the Ordnance Department of the Army. This Act by its terms related solely to the *product* of a plant.

Section 124 authorized the President to make an investigation as to the best means for the production of nitrates and other useful products by water power and any other power, and to—

> designate for the exclusive use of the United States, * * * such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks,

> improvements to navigation, power houses, and other plants and equipment or other means than water power * * *.

The following paragraph of Section 124 authorized the President to purchase or condemn lands, materials, minerals and processes "as may be necessary for the construction and operation of such plants * * * and for the manufacture of such products." This paragraph might be construed as applicable to the instant case were it not for the concluding paragraph, which reads as follows:

> The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

Act of August 29, 1916, c. 418, 39, Stat. 619, 645.

This Act authorized the President through the Secretary of War, "to take possession and assume control of any system or systems of transportation, * * *.

Shipping Board Act (Act of September 7, 1916, c. 451, 39 Stat. 728, 731)

Section 10 of this Act authorized the President to—

> take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board: * * *.

Naval Emergency Fund Act (Act of March 4, 1917, c. 180, 39 Stat. 1168, 1192, 1193)

This Act authorized the President to requisition "ships or war material * * * of the nature, kind, and quantity usually produced or capable of being

produced" by the person with whom the order was placed. This provision appears to be directed solely to manufactured products required for naval purposes. The Act also authorized the President to "requisition and take over for use or operation by the Government any factory, or any part thereof * * *." The authority vested in the President was delegated by him to the Secretary of the Navy. Executive order 2687, dated August 21, 1917.

Emergency Shipping Fund Act (Act of June 15, 1917, c. 29, 40 Stat. 182)

This Act also relates to manufactured products required for naval purposes, and the authority vested in the President was delegated to the Secretary of the Navy under the Executive Order referred to in the preceding paragraph, and to the Emergency Fleet Corporation by Executive Order No. 2664, dated July 11, 1917.

Land Condemnation Act (Act of July 2, 1917, c. 35, 40 Stat. 241; U. S. C., Title 50, Sec. 171)

This Act authorized the Secretary of War to acquire by condemnation land required for—

> the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * *.

There was a proviso to the effect that in time of war possession might be acquired upon the filing of the petition of condemnation.

By an amendment (Act of April 11, 1918, c. 51, 40 Stat. 518; U. S. C., Title 50, Sec. 171), enacted after the issuance of the requisition order to the Niagara Falls Power Company, and the commencement of the diversion of water of the International Paper Company, the purposes for which land might be so condemned were added to as follows:

> and for the construction and operation of plants for the production of nitrates and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operation of such plants.

This amendment was not in effect in December, 1917, and does not purport to ratify acts done at the time of its passage. Nor is there anything to show that the requisition order to the Niagara Falls Power Company had any relation to the production of nitrates or similar products. Furthermore, the amendment is apparently *in pari materia* with Section 124 of the National Defense Act, *supra*, and must be construed as applying only to plants to be constructed and operated solely by the United States.

Food Control Act, known as the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276, 279)

Section 10 of this Act authorized the President—

> to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; * * *.

The context makes it appear doubtful whether the Act was applicable to water power. The authority

conferred upon the President was delegated by him to the Food Administrator, except as to supplies necessary for the support of the Army or the maintenance of the Navy. Executive Order 2736, dated October 23, 1917. It has been determined that actions to recover for property taken under Section 10 must be brought in the District Courts. *United States* v. *Pfitsch*, 256 U. S. 547.

Section 12 of this Act provided for the requisition "for use or operation by the Government," of any "factory, packing house, oil pipe line, mine, or other plant."

Act of October 6, 1917, c. 79, 40 Stat. 345, 352, 353

This Act authorized the President to take over the possession and title to land "including * * * riparian and other rights appurtenant thereto;" but this power was granted only as to land needed "for increasing facilities for the proof and test of ordnance material." Other provisions of this Act (p. 371) authorized the President to take over land and appurtenances necessary "for the construction of torpedo-boat destroyers, their hulls, machinery, and appurtenances."

Act of July 9, 1918, c. 143, 40 Stat. 845, 895

This Act provided that "any person, association, or corporation," for the purposes of furnishing electric power to the United States, or to others engaged in the manufacture of war supplies, might, with the approval of the Secretary of War, institute proceedings for the condemnation of land "required for the location or construction of any line or lines for the transmission of electric power." By Section 3 it

was provided that immediate possession could be secured by the "person, association, or corporation" upon filing a bond to secure payment of just compensation.

This Act was not approved until more than six months after the action taken by the Secretary of War in the instant case.

Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272)

This Act was intended to give a remedy upon contracts irregularly executed, not upon contracts made without authority. *Baltimore & Ohio Railroad* v. *United States*, 261 U. S. 592; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200; *Chesapeake & Potomac Telephone Co.* v. *United States*, 281 U. S. 385.

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